

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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SHERRY SCHNALL, Individually and
On Behalf of All Others Similarly
Situated

Plaintiffs,

-against-

ANNUITY AND LIFE RE (HOLDINGS), LTD.,
XL CAPITAL, LTD., LAWRENCE S. DOYLE,
FREDERICK S. HAMMER, JOHN F. BURKE,
WILLIAM W. ATKIN, BRIAN O'HARA, AND
MICHAEL P. ESPOSITO JR.

No. 3:02 CV 2133 (GLG)

Defendants.

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COMMUNICATIONS WORKERS OF AMERICA;
MIDSTREAM INVESTMENTS LTD, Individually
and On Behalf of All Others Similarly
Situated

Plaintiffs,

No. 3:03 CV 1826 (GLG)

-against-

KPMG LLP (UNITED STATES), KPMG LLP
(UNITED KINGDOM), AND KPMG in BERMUDA,

Defendants.

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RULING ON MOTION TO CONSOLIDATE RELATED ACTIONS
AND TO REQUIRE THE PRESERVATION OF DOCUMENTS

Before this court is plaintiffs' motion to consolidate the case

entitled Communications Workers of America and Midstream Investments Ltd. v. KPMG LLP (United States) et al., 3:03CV1826(GLG), ["KPMG case"], with Schnall v. ANR et al., 3:02CV2133(GLG) ["Schnall case"], and to preserve all documents relating to this litigation. For the reasons set forth below, the court grants plaintiffs' motion in part and denies plaintiffs' motion in part (KPMG Doc. #5, Schnall, Doc. #86).

I. Factual History and Procedural Background

The Schnall matter was commenced on December 4, 2002; subsequently, eight other cases were filed against Annuity and Life Re (Holdings), Ltd. ["ANR"], and its officers and directors. On April 3, 2003, the court granted a motion to consolidate all nine actions, with Schnall as the lead case and Communications Workers of America and Midstream Investments, Ltd. as lead plaintiffs. (Schnall, Doc. #33). On July 11, 2003, the Schnall plaintiffs filed a consolidated amended class action complaint against defendants, ANR, a Bermuda corporation which sells annuity and life reinsurance products, XL Capital, Ltd., owner of between 11.1% and 12.9% of ANR stock, and ANR's officers and directors alleging violations of federal securities laws, which injured purchasers of ANR securities between March 15, 2000 and November 19, 2002 [the "Class Period"]. (Schnall, Doc. #45). Several of the defendants have filed motions to dismiss, which are currently pending.

The KPMG case was commenced on October 23, 2003, alleging, inter alia, that KPMG, ANR's auditors, fraudulently certified financial statements during the Class Period. (KPMG, Doc. #1). To date, only KPMG LLP (United States) ["KPMG U.S."] has filed an appearance. (KPMG, Doc. #7)

II. Discussion

On November, 24, 2003, plaintiffs filed a motion to consolidate the KPMG case with the Schnall case and to preserve all documents relating to this litigation which is subject to the Private Securities Litigation Reform Act of 1995 [the "PSLRA"]. Plaintiffs argue that both actions assert substantially the same claims and raise substantially the same questions of fact and law and, thus, the court should consolidate the two cases pursuant to Federal Rule of Civil Procedure 42. Plaintiffs note that the litigation is in the early stages and that consolidation will not prejudice any of the defendants. (Schnall Doc. #87 at 3).

ANR does not oppose plaintiffs' motion to consolidate. (Schnall Doc. #95 at 1). KPMG U.S., one of the defendants in the KPMG case, does not object to the motion to consolidate pursuant to Federal Rule of Civil Procedure 42(a), subject to and without waiving its rights to request a separate trial pursuant to Federal Rule of Civil Procedure 42(b). (Schnall Doc. #96 at 2). Accordingly, in the interests of judicial economy, the court grants plaintiffs' request

to consolidate the cases, without prejudice to defendants' rights to request a separate trial at a later and more appropriate phase of the litigation.

Plaintiffs also request the court to order the preservation of all documents, including electronic documents, related to this litigation in accordance with 15 U.S.C. §78u-4(b)(3)(C)(i). (Schnall Doc. #87 at 4). Both ANR and KPMG U.S. object to this request. (Schnall Docs. #95 at 1 & #96 at 2). The preservation provision mandates that:

During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(b)(3)(C)(i). The purpose of this provision is "in recognition that the imposition of a stay of discovery may increase the likelihood that relevant evidence may be lost." In re Grand Casinos, Inc. Securities. Litigation, 988 F.Supp. 1270, 1271 (D.Minn.1997) (internal quotation marks and citation omitted). The statute also provides for the possibility of court-ordered sanctions for a party's "willful failure" to comply with the duty to preserve

relevant evidence. 15 U.S.C. § 78u- 4(b)(3)(C)(ii).

"[T]he preservation of evidence in the possession of the parties is statutorily automatic." In re Grand Casinos, Inc. Securities Litigation, 988 F. Supp. at 1273. Both ANR and KPMG U.S. have actual notice of the allegations against them. Furthermore, in their responses to plaintiffs' motion, both ANR and KPMG U.S. each have affirmatively stated that they are fully aware of their obligations under the PSLRA and the sanctions for failure to comply. (Schnall Docs. #95 at 2 & #96 at 2). See In re Tyco International, LTD. Securities Litigation, 2000 WL 33654141, at * 2 (D.N.H. 2000)(denying request for order regarding the preservation of documents and data in the custody or control of defendants because order would unnecessarily duplicate or improperly alter obligations created under PSLRA). Accordingly, the court denies plaintiffs' request for the issuance of a preservation order.

III. Conclusion

For the reasons set forth above, the court grants plaintiffs' motion with respect to consolidation of the two cases, without prejudice to defendants' rights to request a separate trial at a later and more appropriate phase of the litigation, but denies plaintiffs' motion with respect to the issuance of a preservation order. (KPMG Doc. #5 & Schnall Doc. #86).

SO ORDERED.

Date: January 2, 2004
Waterbury, Connecticut.

/s/

GERARD L. GOETTEL,
United States District Judge